IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.

CWP No.: 3374 of 2005
Date of decision: September 8, 2006

M/s Liberty Enterprises, Gharaunda, Karnal.

---Petitioner

Vs.

State of Haryana & another

-----Respondent

CORAM:- HON'BLE MR JUSTICE ADARSH KUMAR GOEL
HON'BLE MR JUSTICE RAJESH BINDAL

Present: Mr. R.P. Sawhney, Advocate with
Mr. Namit Gautam, Advocate
for the petitioner.

Ms. Ritu Bahri, DAG, Haryana.

JUEDGMENT:

This petition seeks declaration of provisions of Section 61 (2)(e) of the Haryana Value Added Tax Act 2003 (for short, 'the HVAT Act'), as amended by Haryana Value Added Tax (Amendment) Act, 2004, to be ultravires and for quashing of order of assessment dated 8.11.2004 passed by the Assessing Authority, Karnal (Annexure P-3).

The petitioner is a dealer registered under the provisions of Haryana General Sales Tax Act, 1973 (for short, 'the 1973 Act') and the HVAT Act. The assessing authority made assessment for the year 2002-03 by including the turnover of sales of Duty Entitlement Pass Book (in short, 'DEPB') issued by the customs authorities under the DEPB Scheme.

The contention raised in the writ petition is that right to credit of duty, as is granted under DEPB Scheme, is not 'goods' and provisions under Section 61(2)(e) of the HVAT Act to the effect that tax is to be charged on sale or purchase thereof was beyond the legislative competence under Entry 54, List-II of 7th Schedule to the Constitution of India.

Impugned amendment is extracted below:-

"2. In the Explanation to clause (d) of the sub-section (2) of section 61 of the Haryana Value Added Tax Act 2003, -

(i) for sign ";" Existing at the end, the sign ";" shall be substituted; and

(ii) after clause (d), the following clauses shall be added at the end, namely:-

"(e) the tax chargeable under the Act of 1973 on the sale or purchase of duty entitlement pass book, effected on or before 31st March, 2003, shall be calculated at the rate of four per cent of the turnover of sale or purchase of such goods, as the case may be, and shall be paid voluntarily without payment of interest on or before 31st March, 2004, whereafter interest at the rate of 18 per cent per annum on the amount of tax due for the period of delay shall be charged.

Provided that where a dealer has charged tax at a rate more than four per cent, the tax shall be calculated and payable at such rate;

While defending the impugned amendment carried out in the HVAT Act, inter-alia, it is contended by the respondents that Clause (e) in Section 61(2) of the Act was added, providing for rate of tax to be 4% on the turnover of sale/purchase of DEPB effected on or before 31.3.2003. It was with a view to give incentive to the petitioner and other similarly situated dealers as prior to the amendment, on the sale/transfer of DEPB, the tax was leviable at the general rate of tax i.e. 10%, whereas, vide amendment, the same has been reduced to 4%. This was done for better collection of tax of DEPB in public interest. It is further submitted that the amendment is in no way confiscatory, rather, is a beneficial legislation. It is further provided for in the amendment that as against normal interest @ 18% per annum provided for in the 1973 Act for delayed payment of tax, no interest was to be charged in case the amount of reduced tax was paid on or before 31.3.2004. Further, it is pleaded that DEPB is a tradable document, which is frequently bought and sold in the market. It is neither a chose in action nor an actionable claim. It is itself a

property and cannot be termed to be a form of money not leviable to sales tax. Levy of tax on DEPB has already been upheld. Reliance has been placed on judgment of Delhi High Court in ***Philco Export*** **v.** ***Sales Tax Officer and others*** (2001) 124 STC 503.

A perusal of order dated October 03, 2005, passed by this Court shows that the petitioner was required to file, in tabulated form, the difference between the benefits available under REP licences under the exemption policy, which was considered by the Hon'ble Apex Court in ***Vikas Sales Corporation*** **v.** ***Commissioner of Commercial Taxes*** (1996) 102 STC 106 and the DEPB scheme, but nothing has been placed on record by the petitioner in this regard.

In **Vikas Sales Corporation's case** (*supra*), while considering the question as to whether import licences called replenishment licences or exim scrips are goods leviable to tax on sales thereof, was considered by Hon'ble the Supreme Court while analyzing the law on the subject, it was held that these licences have their own value. They are freely transferable and bought and sold as such in the market. They are treated and dealt with in the commercial world as merchandise goods. A REP licence/exim scrip is neither a chose in action nor an actionable claim. It is also not in the nature of a title-deed. It is by itself a property. For all intents and purposes, REP licences/exim scrips are goods leviable to tax on the sale or purchase thereof. While deciding the matter, Hon'ble the Supreme Court relied upon an earlier judgment in ***H. Anraj*** **v.** ***Govt. of Tamilnadu*** 1985 Supp. (3) SCR 812, which dealt with the issue as to whether lottery tickets are goods which could be subjected to tax under the Sales Tax laws.

In **Philco Export's case** (*supra*), a Division Bench of Delhi High Court, following the dictum of law laid down in **Vikas Sales Corporation's case** *(Supra)*, held that the Duty Entitlement Passbook Scheme (DEPB), which is intended to neutralize the intents of basic customs duty on the import content of the export produce, which has its own value and freely transferable in the

market, cannot be treated as an actionable claim and has to be held to be a merchandise for all intents and purposes. Accordingly, can be subjected to tax under the sales tax rules.

In ***M/s Sunrise Associates*** v. ***Govt. of NCT of Delhi & Ors.*** JT 2006(5) SC 168, the correctness of earlier judgment of Hon'ble Supreme Court in **H. Anraj's case** (*supra)* was doubted and as **H. Anraj's case** (*supra)* had already been followed in **Vikas Sales Corporation's case** (*Supra)* by a Bench consisting of three Hon'ble Judges, the matter was required to be heard by a Constitution Bench. The Constitution Bench judgment of Hon'ble the Supreme Court in **Sunrise Associate' case** (*supra)* is reported as JT 2006(5) SC 168. The Constitution Bench in **Sunrise Associate' case** (*supra)* has overruled the judgment in **H. Anraj's case** (*supra)*. It is specifically mentioned therein that as the issue regarding taxability of REP licences or DEPB has not been referred to, no opinion is being expressed thereon. Further it is specifically held that the judgment in **H. Anraj's case** (*supra)* is overruled prospectively with effect from the date of the judgment i.e. April 28, 2006.

Relevant passages from the judgment of Constitution Bench in **Sunrise Associates'** Case (*Supra)* are extracted below:-

> **"22. Vikas Sales Corporation & Anr v. Commissioner of Commercial Taxes and Anr.** (supra) was a case where the issue before this Court was whether REP Licenses or replenishment licences were goods so that Sales tax could be levied on their transfer. The REP licences gave permission to an exporter to take credit for the exports made. Such credit could be adjusted against import duty if and when the exporter wished to import goods. The Import and Exporty Policy, 1993, which contained the relevant provisions relating to REP licences specifically permitted transferability of the licences. This Court considered the definition of "goods" in the Constitution, in the Sales of Goods Act, 1930, the Central Sales Tax Act, 1956 the Tamil Nadu General Sales Tax Act, 1959, the Karnataka Sales Tax Act, 1957, as well as the Kerala General Sales Tax Act, 1963 and said that all these definitions provided that goods mean *inter alia* all kinds of moveable property. The definition of property in several

authorities was thereafter considered and it was concluded that the material on record showed a uniform emphasis on the expansive manner in which the expression 'property' was understood. It was noted that debts, contracts and other choses in action were chattels no less than furniture or stock in trade. Similarly, patent, copyrights and other rights *in rem* were also included within the meaning of moveable property. The Court rejected the argument that REP licences were actionable claims within the meaning of Section 3 of the Transfer of Property Act and said:-

> **"**When these licences/scrips are being bought and sold freely in the market as goods and when they have a value of their own unrelated to the goods which can be imported thereunder, it is idle to contend that they are in the nature of actionable claims. Indeed, in **H. Anraj** the main contention of the petitioners was that a lottery ticket was in the nature of an actionable claim. The said argument was rejected after an elaborate discussion of law on the subject. We agree with the said decision and on that basis hold that the REP Licences/Exim Scrips are not in the nature of actionable claims."

"26. Before us the appellants, who are dealers in the sale of lottery tickets, have submitted that **H. Anraj** wrongly drew a distinction between the right to participate in the draw and chance to win the prize. It was submitted that such bifurcation was artificial as both were part of the same transaction. It was submitted that even on the "two rights" theory each of those rights would be choses in action. As far as the decion in **Vikas Sales** in concerned, it was submitted that the additional reason given namely free transferability for holding that a particular thing was goods, was erroneous. It was pointed out that even actionable claims such as negotiable instruments and debentures may be free transferable. As far as the DEPB is concerned, according to the appellants, it was in the nature of a notional credit which an exporter acquires on export by way of an entry in a passbook. This credit was utilizable by the importer to be adjusted against the import duty payable on goods imported. The credit was freely transferable but it could not be said to be goods only by that reason. At best it was an actionable claim."

31. It is necessary at this stage to clarify that the order of reference in **Sunrise v. NCT, Delhi** (supra) is limited to the question whether lottery tickets are 'goods'. We have not been

called upon to answer the question whether REP licences (or the DEPB which has replaced the REP licences) are 'goods'. Although we have heard counsel at length on this, having regard to the limited nature of the reference. We do not decide the issue. The decision in **Vikas Sales** was referred to only because it approved the reasoning in **Anraj** and not because the referring court disagreed with the conclusion in **Vikas Sales** the REP licences were goods for the purposes of levy of sales tax. Indeed REP licences were not the subject matter of the appeal before the referring court and could not have formed part of the reference. The only question we are called upon to answer is whether the decision in **H. Anraj** that lottery tickets are goods for the purposes of Article 366 (29A) (a) of the Constitution and the State Sales Tax Laws, was correct.

37. The word 'goods' for the purposes of imposition of sales tax has been uniformly defined in the various sales tax laws as meaning all kinds of moveable property. The word "property" may denote the nature of interest in goods and when used in this sense means title or ownership in a thing. The word may also be used to describe the thing itself. The two concepts are distinct, a distinction which must be kept in mind when considering the use of the word in connection with the sale of goods. In the Dictionary of Commercial law by A.H. Udson (1983 Edn.) the difference is clearly brought out. The definition reads thus:

41. What then is the distinction between actionable claims and other goods on the sale of which sales tax may be levied.

42. The Court in **Vikas Sales** (supra) said "when these licenses/scrips are being bought and sold freely in the market as goods and when they have a value of their own unrelated to the goods which can be imported thereunder, it is idle to contend that they are in the nature of actionable claims." It was assumed that actionable claims are not transferable for value and that that was the difference between 'actionable claims' and those other goods which are covered by the definition of 'goods' in the Sale of Goods Act, 1930 and the Sales Tax Laws. The assumption was fallacious and the conclusion in so far as it was based on this erroneous perception, equally wrong.

56. We are therefore of the view that the decision in **H. Anraj** incorrectly held that a sale of a lottery ticket involved a sale of goods. There was no sale of goods within the meaning of Sales

> Tax Acts of the different States but at the highest a transfer of an actionable claim. The decision to the extent that it held otherwise is accordingly overruled though prospectively with effect from the date of this judgment. (emphasis supplied).

Learned counsel for the petitioner, however, submitted that the amendment cannot have retrospective effect and in support of this submission, referred to following judgments:-

Ranbir Singh Ram Gopal Vs. State of Haryana (P&H)(2002) 125 STC 326, ***D.Cawasji & Co. Vs. State of Mysore*** (SC) (1985) 58 STC 2, ***Mohamed Abdul Khader Firm Vs. State of Tamilnadu*** (SC) (1985) 58 STC 12, ***Krishnamurthi & Co. v. State of Madras*** (SC) (1973) 31 STC 190, ***KMA Finished Leather (P) Ltd. Vs. State of Tamilnadu*** (Mad.) (2004) 134 STC 185, ***Sadhu Overseas Vs. State of Haryana*** (2004) 23 PHT (Tr), ***Maha Singh Ram Mehar Rice & Gen. Mills Vs. State of Haryana*** (2004) 23 P&HT 4 and ***Union of India & Others Vs. Kamlakshi Finance Corporation Ltd.*** AIR 1992 SC 711. The judgments relied upon by learned counsel for the petitioner would have relevance if we have to determine the question of retrospectivity.

Further in our view, the answer to the question is available on a reading of Constitution bench judgment of Hon'ble the Supreme Court in **Sunrise Association's** case (*supra)*.

Firstly, as is evident from para 31 of the Constitution Bench judgment in **Sunrise Associates'** case (*supra)*, Hon'ble the Supreme Court did not go into the question of taxability of REP licences or DEPB, the issue having not been referred to the Bench. Meaning thereby that judgment of Hon'ble Supreme Court in **Vikas Sales'** case (*supra)* and of Delhi High Court in **Philco's** case (*supra)* taking a view against the petitioner are available. Secondly, even if from discussions in other part of the judgment and the fact that **Anraj's** judgment (*supra)*, which had been relied upon in **Vikas Sales Corporation's** case *(supra)* having been overruled, the judgment in **Vikas**

Sales Corporation's case (supra) should not be relied upon to negative the claim of the petitioner, we find that the contentions raised by the petitioner are liable to be rejected in view of observations in para 56 of the judgment, where judgment in **Vikas Sales Corporation's** case (*supra)* has been overruled with prospective effect only. Meaning thereby that a binding precedent till the date of judgment i.e. 28.04.2006.

In view of our above discussions, we hold the provisions of Section 61(2)(e) of the HVAT Act to be valid and also uphold the order of assessment passed by the assessing authority levying tax on these transactions.

Accordingly, the writ petition is dismissed.

(RAJESH BINDAL)
JUDGE

September 8, 2006 **(ADARSH KUMAR GOEL)**
ashwani **JUDGE**